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# RECENT DECISIONS.

GARDNER P. LLOYD, *Editor-in-Charge.*

AGENCY—AGENT FOR BOTH PARTIES—BURDEN OF LOSS.—The defendant remitted to its local representative, through whom a farm loan had been negotiated by the plaintiff, an amount sufficient to discharge existing encumbrances upon the land. The representative defaulted. *Held*, two judges dissenting, the loss should fall equally upon the borrower and the lender, since the defaulter was the agent of both parties. *Schick v. Warren Mortgage Company* (Kan. 1912) 122 Pac. 872.

Since agency depends not upon status but upon delegated authority to perform acts, *Anson, Contracts*, 330, the same agent may represent adverse parties, but only in the sense that he may perform distinct acts for each, see *Williams v. Millington* (1768) 1 H. Bl. 81, 85, for it seems that only as agent for joint principals could he perform the same act for more than one. If this be so, the court in effect held in the principal case that the borrower and the lender were joint principals in having the mortgage money applied; and upon no other theory, indeed, could the distribution of the loss be justified. But the decision is novel in departing from the usual rule that the agent, in the particular act involved, represented either one party or the other solely. Thus the inadequacy of the security before the discharge of outstanding encumbrances is often considered proof that the lender, in forwarding the money, regarded the agent as his own representative and not the borrower's *Gibson v. Davenport* (1876) 29 Oh. St. 309; *Jensen v. Lewis Investment Co.* (1894) 39 Neb. 371; *contra, Englemann v. Reuse* (1886) 61 Mich. 395; nor does it seem that the lender, by inserting in the application to be filled in by the borrower a clause authorizing payment of the loan to the agent, should be able to shift the risk to the borrower. *McLean v. Ficke* (1895) 94 Ia. 283; *cf. Land Mortgage Co. v. Preston* (1898) 119 Ala. 290; *contra, Robinson v. Jarvis* (1887) 25 Mo. App. 421.

APPEAL AND ERROR—NON-JOINDER IN APPELLATE PROCEEDINGS OF A SURETY ON AN APPEAL BOND.—A motion to dismiss was filed on the ground of the non-joinder of the surety on an appeal bond as an appellant from the joint judgment rendered against him and the principal. *Held*, the motion should be dismissed. *Evans v. Cheyenne C. S. & B. Co.* (Wyo. 1912) 122 Pac. 588.

In general, all parties against whom a joint judgment has been rendered must join in an appeal from that judgment, see *Masterson v. Herndon* (U. S. 1870) 10 Wall. 416, so that the court may not be compelled to review the same judgment several times. *McIntyre v. Sholty* (1891) 139 Ill. 171; *Bartlett v. Keating* (1898) 79 Ill. App. 642. Strict adherence to this rule is enforced when the surety is a party to the original action, for his liability is then to be determined by the merits of the case against him. *Estes v. Trabue* (1888) 128 U. S. 225. When, however, he is involved in the record only as liable for a judgment rendered against the principal, few courts insist on his being joined, but see *Sellers v. Smith* (1904) 143 Ala. 566; *Thomas v. Wyatt* (Miss. 1848) 9 Smedes & M. 308, and by the weight of authority he is not considered a necessary party on appeal, since he presents no issues to be tried in the case and is adequately represented by the principal.

*Hurst v. Lakin* (1911) 13 Ariz. 328; *Hudson v. Grafflin* (1896) 72 Fed. 200. As an interested party he may, nevertheless, join in such an appeal. See *Jewett v. Crane* (N. Y. 1861) 35 Barb. 208. In the principal case, as the liability of the surety arose on the appeal bond and not on the original suit against the principal, and as a statute declared that the surety should be liable only in case of the failure of the principal to satisfy the judgment, the court was justified under the prevailing doctrine in holding that the surety was not a necessary party. See *The New York* (1900) 104 Fed. 561.

**CARRIERS—LIMITATION OF LIABILITY—FREE PASS.**—The plaintiff was injured while riding on the defendant railroad on a free pass exempting the latter from liability for negligence. *Held*, the defendant was nevertheless liable. *Huckstep v. St. Louis & H. Ry. Co.* (Mo. 1912) 148 S. W. 988.

In general, a contract of a common carrier against liability for negligence to passengers is void, since it is extorted under duress of circumstances and is against public policy, as tending to relax the carrier's vigilance. *Railroad Co. v. Lockwood* (1873) 17 Wall. 357. Some jurisdictions, including that of the principal case, have also applied the rule to contracts made with gratuitous passengers, considering them on the same footing as passengers for hire. *Railroad Co. v. McGown* (1886) 65 Tex. 640; *Railroad Co. v. Hopkins* (1868) 41 Ala. 486. Admitting that the relation of common carrier and passenger exists in such cases, the reasons for the general rule above are inapplicable. The holder of a gratuitous pass is not obliged to accept its terms, and the number of passes issued is too small to induce any negligence on the carrier's part. *Quimby v. Railroad* (1890) 150 Mass. 365; *Rogers v. Steamship Co.* (1894) 86 Me. 261. But while a railroad is under the obligation of a common carrier in respect to its duty to protect free as well as regular passengers, independent of contract, *Railroad v. Derby* (1852) 14 How. 486; *Indianapolis etc. Co. v. Klentschy* (1907) 167 Ind. 598, it does not follow that as to the former it is in all respects to be regarded as such. 1 Wyman, Pub. Serv. Corp., §§ 785, 786. It is essential to the status of common employment that the carriage be for hire; *Citizens' Bank v. Steamboat Co.* (1841) 2 Story 16; hence as to gratuitous passengers a railroad is a mere private carrier, whose contracts are subject to none of the stringent rules of policy applied to public service companies. *Railroad Co. v. Adams* (1904) 192 U. S. 444; *Griswold v. Railroad Co.* (1885) 53 Conn. 371. From any standpoint, therefore, the decision in the principal case cannot be supported, and is, moreover, opposed to the weight of authority. 2 Hutchinson, Carriers, § 1075.

**CONSTITUTIONAL LAW—CRUEL AND UNUSUAL PUNISHMENTS—STERILIZATION OF CRIMINALS.**—A statute provided that any person convicted of rape upon females under ten years of age should be subjected to the operation of vasectomy. *Held*, the statute did not impose a "cruel punishment" within the meaning of the Washington Constitution. *State v. Feilen* (Wash. 1912) 126 Pac. 75.

The power to fix punishment for crime is inherently in the legislature, and the courts have always been reluctant to interfere, save in the most extreme cases. *Comm. v. Murphy* (1895) 165 Mass. 66; *Territory v. Ketchum* (1901) 10 N. M. 718. They may, however, declare a punishment within the constitutional inhibitions if it is either shocking

in character, or excessive in degree. *Weems v. United States* (1909) 217 U. S. 349; 1 Bishop, New Cr. Law, (8th ed.) § 947. Since death is not considered a penalty disproportionate to the crime of rape, see *Mischer v. State* (1899) 41 Tex. Cr. 212; *Reyna v. State* (Tex. 1903) 75 S. W. 25, it follows that no lesser punishment can be excessive, though it might nevertheless be unconstitutional if regarded as shocking in character. But in general, only those punishments which outrage the public sense of propriety are so regarded, see *Hobbs v. State* (1892) 133 Ind. 404; *Garcia v. Territory* (1869) 1 N. M. 415, and there is nothing in the nature of sterilization which would justify its condemnation on this ground. It is clear, therefore, that in the principal case there were no proper grounds for interference by the judiciary. Moreover, it is probable that the same result would be reached in other jurisdictions, although the Washington Constitution, unlike that of most States, does not prohibit unusual punishments, for it is well settled that the words "cruel and unusual" must be construed together and that an otherwise proper punishment will not be rendered unconstitutional on the ground of novelty alone. *People v. Durston* (1890) 119 N. Y. 569; *Storti v. Comm.* (1901) 178 Mass. 549.

CONTRACTS—PARTIAL RESTRAINT OF TRADE—GOOD WILL.—The defendant, a chiroprapist, sold the plaintiff her business and good will. Later she set up in business again in the same city. *Held*, the plaintiff was entitled to an injunction. *Brown v. Benzinger* (Md. 1912) 84 Atl. 79.

It was an ancient rule of the common law that a contract in restraint of trade was void, as against public policy, *Dyers' Case* (1415) Y. B. 2 Hen. V. p. 5. pl. 26; *Ipswich Tailors' Case* (1615) 11 Coke 53, and a contract in unreasonable restraint of trade is still unenforceable, *Alger v. Thacher* (Mass. 1837) 19 Pick. 51; *Ward v. Byrne* (1839) 5 M. & W. 547, but if the contract applies only to the territory in which the business to be protected is carried on, it may now usually be enforced. *Diamond Match Co. v. Roeber* (1887) 106 N. Y. 473; *Oregon Navigation Co. v. Winsor* (1873) 87 U. S. 64. In some jurisdictions, however, a contract in general restraint of trade is held invalid whether reasonably necessary for the protection of the business or not, on the ground that it might compel a man to transfer his residence and allegiance to another state. *Taylor v. Blanchard* (Mass. 1866) 13 Allen 370, 375; *Union Strawboard Co. v. Bonfield* (1901) 193 Ill. 420; but see *Oregon Navigation Co. v. Winsor supra*. Moreover, it has been laid down as a general rule that no contract in restraint of trade may rest upon implication alone. *Cottrell v. Babcock, etc. Co.* (1886) 54 Conn. 122; *Porter v. Gorman* (1879) 65 Ga. 11. It seems, however, that such a contract should be implied when the value of a sale of good will is wholly dependent upon this implication. *Dwight v. Hamilton* (1873) 113 Mass. 175; *Foss v. Roby* (1907) 195 Mass. 292. As this is particularly true with regard to the good will of a profession, *Foss v. Roby supra*, as in the principal case, the decision adopts the preferable rule.

CONTRACTS—REWARDS—PUBLIC OFFER—ACCEPTANCE.—The defendant publicly offered a reward for the return of certain books. The plaintiff, who was ignorant of the offer, returned the books. *Held*, the plaintiff was entitled to the reward. *Sullivan v. Phillips* (Ind. 1912) 98 N. E. 868.

Since a contract is a meeting of the minds, *Smith v. Vernon*

*County* (1905) 188 Mo. 501, it would seem that a reward cannot be earned by one who does not know that it has been offered. See note to *Broadnax v. Ledbetter* (Tex. 1907) 9 L. R. A. [N. s.] 1057. The view adopted in the principal case has, however, been defended on various theories. Some authorities hold that the offer of a reward is a conditional promise, the condition being the performance of the desired services. *Auditor v. Ballard* (Ky. 1873) 9 Bush 572; Story, Contracts, § 380. But a promise which has not been communicated, and for which no consideration has been given, cannot be binding. See Langdell, Contracts, § 14; *Bailey v. Walker* (1860) 29 Mo. 407. Another view is that offers of rewards should be enforced as a stimulant to activity. *Drummond v. U. S.* (1900) 35 Ct. Cl. 356, but it is difficult to understand how a person's activities can be stimulated by that of which he is ignorant. It is also said that knowledge of the offer is immaterial, because the services performed without it are none the less valuable to the defendant. *Dawkins v. Sappington* (1866) 26 Ind. 199. This value received might be the basis of a recovery in quasi-contract, but it cannot supply the elements of a contract. *Broadnax v. Ledbetter supra*. It would seem, therefore, that the view of the principal case is an anomaly in the law of contracts, see *Dawkins v. Sappington supra*, which cannot be supported on theory.

CORPORATIONS—DIRECTORS—SECRET PROFITS.—An officer of a corporation took advantage of his position to make a secret profit, and divided the proceeds with three of the directors. *Held*, two judges dissenting, the directors were jointly and severally liable to account to the corporation. *Asphalt Const. Co. v. Bouker et al.* (1912) 135 N. Y. Supp. 714.

A director's duty to carefully manage the corporation, 1 Morawetz, Corporation, § 554, necessarily forbids the use of his fiduciary capacity for private gain. *Ry. Co. v. Blaikie* (1853) 1 Macq. 461, and he is liable at law to the corporation for mismanagement. *New Haven Trust Co. v. Doherty* (1903) 75 Conn. 555. The cause of action, however, is several, for one director is not liable for a co-director's act unless he has contributed to it, but is held only for the natural consequences of his own wrongdoing. *O'Brien v. Fitzgerald* (1894) 143 N. Y. 377; *People v. Eq. Life Ass. Soc.* (N. Y. 1908) 124 App. Div. 714. The fiduciary character of their position has led equity also to take jurisdiction over directors, treating them as trustees. 2 Thompson, Corporations, § 1215. But a trustee is not jointly liable for the fraud of his co-trustee unless he has furnished the opportunity for it. 1 Perry, Trusts, § 415; *cf. Hunter v. Hunter* (1872) 50 Mo. 445. On any theory, therefore, the amount received by each director should be the measure of his liability, *Loudenslager v. Land Co.* (1899) 58 N. J. Eq. 556; *Gaskell v. Chambers* (1858) 26 Beav. 360, unless there is evidence of concerted action in the commission of the wrongful act. *Spaulding v. Town Site Co.* (1900) 106 Wis. 481; *Bosworth v. Allen* (1901) 168 N. Y. 157. It is not clear in the principal case whether such evidence was presented, but if it were not, the result is unsupportable, for a mere subsequent division of plunder would not seem to be sufficient to warrant a joint and several judgment. *Cf. Loudenslager v. Land Co. supra*.

CORPORATIONS—STOCKHOLDER'S LIABILITY—CREDITOR'S REMEDY.—Under a statute imposing upon stockholders an unlimited individual liability

for corporate debts arising from labor contracts, and providing for subsequent contribution, a creditor-stockholder brought an action at law against fellow stockholders. *Held*, since the stockholder's liability under the statute was the same as that of a partner at common law, the plaintiff must sue in equity for contribution. *Shurlow v. Lewis et al.* (Mich. 1912) 136 N. W. 484. See Notes, p. 636.

**CROPS—OWNERSHIP—CONTRACTS.**—One Stebbins contracted to farm the defendant's land on shares. Before harvesting time he sold an undivided share of the crops to the plaintiff, and later rescinded the contract. *Held*, two judges dissenting, Stebbins and the defendant were tenants in common of the crops, and the plaintiff was therefore entitled to one-half of them. *Crosby v. Wolbren* (1912) 134 N. Y. Supp. 328.

It is often doubtful whether an agreement whereby a cultivator promises to farm land on shares should be construed as a lease or as a mere contract. Where the agreement gives exclusive possession to the cultivator, it is generally interpreted as a lease, 1 *Tiffany, Land. & T.* § 10; *Steele v. Frick* (1867) 56 Pa. 172, but in the absence of any such clear indication, it is usually not so considered. *Taylor v. Bradley* (1868) 39 N. Y. 129; *Putnam v. Wise* (N. Y. 1841) 1 Hill 234. Thus the cultivator is frequently regarded as a mere servant, who is to receive a share of the crops as wages. *Bryant v. Pugh* (1890) 86 Ga. 525; *Patton v. Heustis* (1857) 26 N. J. L. 293. The better view, however, seems to be that the agreement conveys an interest in the crops to the cultivator, constituting him a tenant in common with the landowner, *Taylor v. Bradley supra*, for it is probably the intention of the parties that the landowner shall be thus assured of his share of the proceeds of the land, and the cultivator of the fruits of his labor. *Putnam v. Wise supra*. Where the agreement is held to be a lease, either the regular rule that a tenant owns all the crops is applied, *C. & W. M. Ry. Co. v. Linard* (1883) 94 Ind. 319; *Doremus v. Howard* (1852) 23 N. J. L. 390, or the landlord is regarded as excepting a half interest in them from the terms of his demise. *Moulton v. Robinson* (1853) 27 N. H. 550. Whether or not there was a lease in the principal case, therefore, the court was correct in holding that the cultivator had an assignable interest in the crops.

**DESCENT AND DISTRIBUTION—MANNER OF TAKING—BREAKING DESCENT.**—The intestate, being erroneously advised that a purchase directly from his co-heirs would be illegal, joined with them in a conveyance to a third person, who, pursuant to agreement, reconveyed to him. Upon the death of the intestate without issue, his collateral heirs claimed a share in the interest he had originally inherited. *Held*, the claim was invalid, since the intestate had manifested an intention not to break the descent. *Dudrow v. King* (Md. 1912) 83 Atl. 34. See Notes, p. 625.

**DIVORCE—ALIMONY—COMMITTAL ON CONTEMPT AS "IMPRISONMENT FOR DEBT."**—The defendant was imprisoned, in contempt proceedings, for failure to pay alimony. He pleaded the constitutional guaranty against imprisonment for debt. *Held*, his committal was not such imprisonment. *Adams v. Adams* (1912) 83 Atl. 190. See Notes, p. 638.

**EQUITY—REFORMATION OF WRITTEN INSTRUMENTS—SPECIFIC PERFORMANCE—STATUTE OF FRAUDS.**—The plaintiff sued on the ground of fraud to supply by parol an essential part of an executory contract for the

sale of land, and for the specific performance of the contract as reformed. The defendant pleaded the Statute of Frauds. *Held*, the plea was good. *Safe Deposit Co. v. Diamond Coal Co.* (Pa. 1912) 83 Atl. 54.

Fraud or mistake gives equity jurisdiction to reform a written instrument upon parol evidence, and when the effect of this reformation is to limit or defeat the instrument, the Statute of Frauds is not a bar to specific performance. *Gillespie v. Moon* (N. Y. 1817) 2 Johns. Ch. 585. But when parol evidence enlarges the scope of the contract, it seems that, in the absence of part performance, or any other equitable estoppel, see *Tilton v. Tilton* (1838) 9 N. H. 385, the Statute of Frauds, which prohibits the enforcement of parol agreements for the sale of land, should be a bar, *Elder v. Elder* (1833) 10 Me. 80, for a written instrument which requires parol testimony to establish any essential part stands on the same footing as an oral contract. See *Moale v. Buchanan* (Md. 1840) 11 Gill. & J. 314. In some courts, however, an opposite view obtains, on the ground that it would be useless to reform unless the parties may enforce the corrected contract, and that, if a defendant may show the true agreement by way of defense, a plaintiff should be able to establish his rights by it. See *Barry v. Harris* (1877) 49 Vt. 392; *Keiselbrack v. Livingston* (N. Y. 1819) 4 Johns. Ch. 144. But there is nothing inconsistent in holding that fraud may vitiate a writing tainted with it, but has no creative power to take a oral contract out of the Statute of Frauds. *Glass v. Hulbert* (1869) 102 Mass. 24. It is evident, therefore, that the principal case is correct.

**FIXTURES—CHATTEL MORTGAGES—RECORD—EFFECT AS NOTICE.**—One Beach executed a chattel mortgage on certain mill machinery to the plaintiff. Later he affixed the machinery to the land and mortgaged the premises to the defendant. *Held*, the machinery became part of the realty and the subsequent real estate mortgage took priority over the chattel mortgage. *Elliot v. Hudson* (Cal. 1912) 124 Pac. 103.

If the court is correct in holding that the machinery became part of the realty when it was affixed to the land, the decision is undoubtedly correct, for the recording of a chattel mortgage is notice of liens only upon personal property, *Brennan v. Whitaker* (1865) 15 Oh. St. 446; *Tibbets v. Horne* (1889) 65 N. H. 242, and instruments affecting real estate are ineffective against subsequent encumbrancers unless recorded in the realty record. *Cady v. Purser* (1901) 131 Cal. 552, 559. But intention is an essential element in the creation of a fixture, *Warner v. Kenning* (1878) 25 Minn. 173; *Ford v. Cobb* (1859) 20 N. Y. 344, and, when the owner has once expressed his intention that the article shall remain personalty by making it the subject of a chattel mortgage, it is generally held that he cannot later change its character by affixing it to the land, if it retains the necessary attributes of personal property in being capable of removal without substantial damage to the realty. *Tift v. Horton* (1873) 53 N. Y. 377. It is urged by some courts that this doctrine works a hardship in that it compels a purchaser of real estate to search the records of chattel mortgages. *Bringholff v. Munsenmaier* (1866) 20 Ia. 513. However, when an article may be removed without injury it must be apparent to a purchaser that it may or may not be part of the realty, and under these circumstances, there is no hardship in forcing him to make such a search. *Sword v. Low* (1887) 122 Ill. 487; *Kribbs v. Alford* (1890) 120 N. Y. 519; *Rowlands v. West* (N. Y. 1892) 62 Hun. 583, 586.

**INSURANCE—MORTGAGEE CLAUSE—RECOVERY AFTER PAYMENT OF MORTGAGE DEBT.**—The plaintiff, a mortgagee, had been paid the full amount of the mortgage debt after the loss, but before suit against the insurance company. *Held*, there could be no recovery from the company. *Heilbrunn v. German Alliance Ins. Co.* (N. Y. 1912) 135 N. Y. Supp. 769. See Notes, p. 631.

**JUDGES—DISQUALIFICATION—RELATIONSHIP TO INTERESTED PARTY.**—The plaintiff's attorneys, who had the case on a contingent fee, were the son and brother-in-law of the presiding judge. *Held*, the judge was disqualified. *Yazoo & M. V. R. Co. v. Kirk* (Miss. 1912) 58 So. 710.

The common law regarded a judge as disqualified to sit in his own case, *Bonham's Case* (1610) 8 Coke 118; see *Dimes v. Grand Junction Canal Co.* (1852) 16 Eng. L. & Eq. 63, but relationship to an interested party was not a disqualification. *Brookes v. Rivers* (1680) Hardres 503; see *Matter of Dodge etc. Co.* (1879) 77 N. Y. 101. Statutes in almost all jurisdictions, however, now provide that a judge may not sit in a case in which he or a relative is a party. This is interpreted as applying to all cases where the relative is a party in interest, regardless of whether he is a party of record or not, see *Matthews v. Noble* (N. Y. 1898) 25 Misc. 674, and, indeed, relationship to a merely nominal party is not a ground of disqualification. *Matter of Hopper* (1835) 5 Paige 489; see *Fowler v. Byers* (1855) 16 Ark. 196. But courts are not at all in harmony as to what amount of interest it is necessary that a relative should have in order to disqualify a judge. Thus it has been held that an owner of stock in a litigating corporation is not a party in interest, *Matter of Dodge etc. Co. supra*; *Turnpike Co. v. Cutler* (1834) 6 Vt. 315; *contra*, *Bank v. McGuire* (1899) 12 S. D. 226, while the opposite conclusion was reached in the case of a surety, though he was indemnified against loss. *Oakley v. Aspinwall* (1850) 3 N. Y. 547. It seems clear, however, that the interest of an attorney who is trying a case on a contingent fee is sufficiently personal and direct to disqualify a judge who is related to him from sitting in the case. *Roberts v. Roberts* (1902) 115 Ga. 259; *Vine v. Jones* (1900) 13 S. D. 54.

**MASTER AND SERVANT—ASSUMPTION OF RISK—KNOWLEDGE OF DEFECT.**—The plaintiff was injured as a result of her employer's negligent failure to provide a guard-rail for the mangle with which she was working. She realized that the work was dangerous, but knew nothing of such a safeguard as a guard-rail. *Held*, one judge dissenting, she did not assume the risk of the injury in question. *Duggan v. Heaphy* (Vt. 1912) 83 Atl. 726. See Notes, p. 629.

**MORTGAGES—CLOGGING THE EQUITY OF REDEMPTION—COLLATERAL STIPULATIONS.**—There was a mortgage of a twenty year leasehold interest with a provision that without the mortgagee's written consent the mortgage debt should not be wholly paid off till a date within six weeks of the expiration of the lease. The mortgagor sought to redeem before the appointed time. *Held*, he might redeem, since the provision was void as a clog upon his equitable right. *Fairclough v. Swan Brewery Co., L. R.* [1912] A. C. 565.

**PARTNERSHIP—MARSHALLING OF ASSETS—DOUBLE PROOF OF JUDGMENT FOR TORT.**—The plaintiff had secured a judgment against a partner-

ship for the conversion of certain securities. Later the partnership made a general assignment for the benefit of its creditors, and each of the individual partners made a similar assignment. The plaintiff sought to prove his claim against both the partnership estate and the estates of the individual partners. *Held*, he should be allowed to do so. *Matter of Peck* (1912) 206 N. Y. 55.

For a discussion of the principles involved in this case, see 11 COLUMBIA LAW REVIEW 795.

PERPETUITIES—NEW YORK RULE—CONSTRUCTION OF BEQUEST.—There was a bequest of \$2000 to executors in trust to pay the income to the testator's son for five years, when the principal was to be paid over to him. *Held*, the bequest was not void on account of the suspension of the power of alienation, since the trust feature would be ignored and the gift upon the testator's death vested in the son as a legacy. *Matter of Lincoln Trust Co.* (N. Y. 1912) 76 Misc. 413.

It is, of course, a well-established, if somewhat vague, principle that courts will seek to give an instrument that construction which will leave it legally effectual. Apart from such judicial interpretation, the above testamentary disposition clearly creates an express trust which suspends illegally the power of alienation, since the property is inalienable for a period not measured by lives in being. Chaplin, *Suspension of the Power of Alienation*, (2nd ed.) §§ 76, 395; Pers. Prop. L. 15; *Underwood v. Curtis* (1891) 127 N. Y. 523. In order to save situations which on their face appear obnoxious to the New York rule against perpetuities, the decisions have gone far in construing an express trust in which the *cestui* was also the appointed ultimate owner of the *res*, as not being a real trust at all, but only a power to hold and pay over, while the legal title vests at once in the beneficiary and only the time of payment is deferred. *Warner v. Durant* (1879) 76 N. Y. 133; see *In re Hart's Trustees* (1858) 3 DeG. & J. 195. If the title does so vest, the legacy is saved; for the legatee can destroy the power by alienating his legal title and thus pass an absolute fee in possession to his transferee. *Hetzel v. Barber* (1877) 69 N. Y. 1, 11; *Lovett v. Gillender* (1866) 35 N. Y. 617. In most of the cases relied on by the court above, additional language is discoverable which fairly imports an intention to give the title directly to the legatee, *Bushnell v. Carpenter* (1883) 92 N. Y. 270; *In re Dippel's Will* (1902) 76 N. Y. Supp. 201, but several decisions have gone the full length of the principal case. *Warner v. Durant supra*; *Steinway v. Steinway* (1900) 163 N. Y. 183; *Matter of Schmidt* (1910) 137 App. Div. 286. The cases last cited imply that the title passes as a rule of property. This, however, seems too broad; for the courts have frequently enforced a trust under similar circumstances, when it could be shown that the rule against perpetuities was not being contravened. *Stevenson v. Lesley* (1877) 70 N. Y. 512; *Hillyer v. Vandewater* (N. Y. 1890) 24 N. E. 999; *cf. Vanderpoel v. Loew* (1889) 112 N. Y. 167.

PRINCIPAL AND SURETY—CREATION OF RELATION—EXECUTION OF WRITTEN INSTRUMENT.—The plaintiff sued the defendants as sureties on a bond given to secure faithful performance of a written contract. The principal named in the bond had not signed it. *Held*, the sureties were bound. *Star Grocer Co. v. Bradford et al.* (W. Va. 1912) 74 S. E. 509.

It is thought in some jurisdictions, that to hold a surety bound when the principal named in the bond fails to sign it, would be to extend the obligation of the surety beyond the scope of his written contract. *Johnston v. Kimball Township* (1878) 39 Mich. 187. Moreover, since the principal's failure to sign is apparent upon the face of the instrument, no estoppel can arise from the fact that the surety has permitted it to be issued in an incomplete form. *Wildcat Branch v. Ball* (1873) 45 Ind. 213. It is clear that when the principal fails to sign a bond which contains his sole obligation, a surety can have no right of subrogation against him, *Bean v. Parker* (1822) 17 Mass. 591, and to hold the surety bound in such a case, therefore, would be to make him primarily and not secondarily liable, a result not at all within the contemplation of his contract. *Ferry v. Burchard* (1852) 21 Conn. 597. So, also, when one of several sureties fails to sign, the others can exact no contribution from him, and so should be themselves released. *Fletcher v. Austin* (1839) 11 Vt. 447. But when the principal is already obligated, the surety's right of subrogation is not affected by his failure to sign, and the technical imperfection should not defeat a recovery. *Williams v. Marshall* (N. Y. 1864) 42 Barb. 524. This view is supported by the weight of authority, and, although the surety may be put to some inconvenience in being unable to use the bond as evidence against his principal, it seems that the material terms of his contract have been complied with, and he should be bound. *State v. Bowman* (1841) 10 Oh. 445.

REAL PROPERTY—ESTATES ON CONDITION SUBSEQUENT—RIGHT OF RE-ENTRY—ASSIGNMENT.—Two of the heirs of a grantor of land upon condition subsequent, after breach of the condition assigned their right of re-entry to the third, who brought suit for possession of the entire premises. *Held*, two judges dissenting, she was entitled to succeed. *Southwick v. New York Christian Missionary Society et al.* (1912) 135 N. Y. Supp. 392.

An attempted assignment of a right of re-entry upon condition subsequent constituted maintenance at common law, Co. Lit. 214-a, and as such has been repeatedly held in New York to vest no interest in the assignee, whether made before or after breach. *Nicholl v. N. Y. & Erie Rd.* (1854) 12 N. Y. 121; *Underhill v. Saratoga & Washington Rd.* (N. Y. 1855) 20 Barb. 455. Moreover, when such an illegal assignment is attempted, it has the effect of extinguishing the condition upon which the land was conveyed, *Tinkham v. Erie Rd.* (N. Y. 1866) 53 Barb. 393; *Rice v. Boston & Worcester Rd.* (Mass. 1866) 12 Allen 141, and therefore the dissenting judges in the principal case contended that the grantee's estate had become absolute as against the two assignors, thus limiting the plaintiff's measure of recovery to one-third of the premises. But since a right of re-entry is inherently indivisible and one of several heirs may enforce the condition for the benefit of all, *Bowyer v. Baltimore & N. Y. Ry.* (1901) 67 N. J. L. 281, it must follow that the plaintiff was entitled to recover either the entire land or none of it. And since an attempted transfer of the right between heirs where no strangers are involved could give rise to no new litigious rights, it cannot be regarded as maintenance and should not deprive the plaintiff of his original right to possession of the whole upon breach of condition. Even assuming a right of re-entry to be severable, it would seem that such a transfer would tend to lessen rather than increase litigation and hence cannot be condemned as champe-

trous. *Cf. Russell v. Doyle* (1886) 84 Ky. 386; *Speer v. Duff* (Ky. 1901) 65 S. W. 126. It is clear, therefore, that the prevailing opinion is correct.

SALES—CONTRACTS TO MANUFACTURE—DAMAGES.—After part performance, the defendant refused to accept the balance of a quantity of staves which the plaintiff had agreed to make and supply. *Held*, the measure of damages for completed staves was the difference between the contract and market prices; for staves not yet made, the difference between the contract price and the cost of manufacture. *Mangold Co. v. Lucas E. Moore Stave Co.* (1912) 197 Fed. 20.

Damages in contract aim at compensation, but cannot be greater than the parties contemplated as naturally arising from the breach. *Hadley v. Baxendale* (1854) 9 Exch. 341. Interesting applications of this general rule often appear in computing damages for a vendee's failure to accept goods manufactured for him. On refusal to accept a completed article, damages are measured by the difference between the contract price and the market value, *Belle of Bourbon Co. v. Leffler* (N. Y. 1903) 87 App. Div. 302; *cf. Bookwalter v. Clark* (1882) 10 Fed. 793, not because a sale would be on the vendee's account, but as the natural result of the vendor's position at breach, since he can dispose of the article on hand in the market, the difference between the amount received and the contract price being the actual injury he has suffered. *Tufts v. Greuer* (1891) 83 Me. 407; *contra, Bement v. Smith* (N. Y. 1836) 15 Wend. 493. On the other hand, if the vendee notifies the vendor to stop work, the latter should not be permitted to continue and increase his damages by tendering the completed article. *Davis v. Bronson* (1891) 2 N. D. 300; *Tufts v. Weinfeld* (1894) 88 Wis. 647; *cf. Roehm v. Horst* (1900) 178 U. S. 1. The vendor cannot collect for avoidable damages and so is limited to the profit that would have naturally flowed from the contract price and the cost of production. *Broadnax v. United etc. Co.* (1904) 128 Fed. 649; *Hinckley v. Steel Co.* (1887) 121 U. S. 264. Some courts have, however, apparently erroneously, allowed a recovery of the difference between the contract price and the market value. *Dolph v. Laundry Co.* (1886) 28 Fed. 553; *Heiser v. Meers* (1897) 120 N. C. 443; *cf. Todd v. Gamble* (1896) 148 N. Y. 382.

STATUTE OF FRAUDS—PAROL GIFT OF LAND—ENFORCIBILITY.—In an action to quiet title, the plaintiff proved that the land had been given to him by parol, that he had made substantial improvements on it, and that the defendant had taken a conveyance of the land with notice of these facts. *Held*, the plaintiff was entitled to the relief demanded. *Kinsell v. Thomas* (Cal. 1912) 124 Pac. 220.

In general, no title to real estate can be acquired solely by a parol gift, *Thaggard v. Crawford* (1900) 112 Ga. 326; *Hamilton v. Ogee* (1901) 10 Kan. App. 241, and a donee in possession has only the rights of a tenant at will. *Jackson v. Rogers* (N. Y. 1805) 2 Caines Cas. 314. By the weight of authority, however, the donee will be protected in equity when he has entered into possession and made substantial improvements, *Dillwyn v. Llewelyn* (1862) 4 DeG., F. & J. 517; *Hardesty v. Richardson* (1876) 44 Md. 617, for in such a case the result of the enforcement of the Statute of Frauds would be to work a fraud rather than to prevent one. *Burkholder v. Ludlam* (Va. 1878) 30 Gratt. 255. But the improvements must be of a substantial

character, *Wack v. Sorber* (Pa. 1837) 2 Whart. 387; see *Bigelow v. Bigelow* (1900) 93 Me. 439, and must have been made in reliance on the gift. *Truman v. Truman* (1890) 79 Ia. 506. A few courts, on the other hand, will not permit a donee to thus acquire title by parol, *Adamson v. Lamb* (Ind. 1834) 3 Blackf. 446; *Rucker v. Abell* (Ky. 1848) 8 B. Mon. 566, but will instead allow him compensation for improvements made on the land. *Hamilton v. Hamilton* (Ky. 1824) 5 Litt. 29; see *Evans v. Battle* (1851) 19 Ala. 398. When the gift has not been executed, but there is an executory oral promise to make it, equity will usually not aid a volunteer by decreeing specific performance, *Boze v. Davis* (1855) 14 Tex. 331; *contra*, *Freeman v. Freeman* (1870) 43 N. Y. 34, although compensation may be awarded for improvements. See *Ridley v. McNairy* (Tenn. 1842) 2 Humph. 174.

STATUTES—CONSTRUCTION—EXEMPTIONS—JUDGMENTS IN TORT.—The plaintiff sought to enforce a previously acquired judgment in tort as a lien upon land exempt by statute (32 Okla. Stat. c. 1362) from any "debt contracted" prior to its allotment. *Held*, the judgment was a valid lien. *Simmons v. Mullen* (Okla. 1912) 122 Pac. 518.

Judgments, regardless of the cause of action upon which they are founded, represent claims for liquidated damages, and are essentially debts. *Anniston v. Hurt* (1903) 140 Ala. 394; 2 Black, Judgments, § 577. They are, moreover, frequently regarded as contracts; 3 Bl. Com. 160; *Morse v. Toppan* (Mass. 1855) 3 Gray 411; but when founded upon tort actions, they entirely lack the requisite element of consent, and are at most merely quasi-contractual obligations. *Louisiana v. New Orleans* (1883) 109 U. S. 285; see *O'Brien v. Young* (1884) 95 N. Y. 428. However, since exemption statutes are liberally construed, it has been held that under statutes similar to that in the principal case a judgment in tort is not enforceable against exempt property, on the theory that the expression "debt contracted" is equivalent to "liability incurred." *In re Radway* (1877) 3 Hughes 609; *Mertz v. Berry* (1894) 101 Mich. 32. But it is a cardinal principle of construction that clear and unequivocal language should be given its ordinary meaning; *United States v. Diamonds* (1905) 139 Fed. 961; hence it would seem that the above view is unwarranted, especially as it is a more imperative rule of public policy that tortfeasors should be punished than that exempt property should be protected. *Brun v. Mann* (1906) 151 Fed. 145; see *Whiteacre v. Rector* (Va. 1878) 29 Gratt. 714. The result reached in the principal case, therefore, is in accordance with sound rules of construction and policy, and, moreover, is supported by the weight of authority. See *Shelby v. Ziegler* (1908) 22 Okla. 799.

TAXATION—FOREIGN CORPORATIONS—CAPITAL EMPLOYED WITHIN THE STATE.—The plaintiff, a foreign corporation conducting its entire business in the State of New York, sought relief from an assessment of open accounts due from non-residents of New York, claiming that they did not constitute capital stock employed within the State. *Held*, the accounts were taxable. *People ex rel. David Williams Co. v. Sohmer* (1912) 137 N. Y. Supp. 23.

A State has the power to tax a foreign corporation upon its property employed within that State for purposes of business. *Postal Telegraph Cable Co. v. Adams* (1895) 155 U. S. 688. Moreover, both

tangible and intangible property, as debts and accounts, whether evidenced by written instruments or not, are subject to taxation. *Hunter v. Supervisors* (1871) 33 Ia. 376. Intangible property, however, under the influence of the maxim *mobilia personam sequuntur*, is regarded as having its *situs* at the place of residence of the creditor. *Hunter v. Supervisors supra*. But it would seem that this maxim is a mere fiction, adopted for the sake of convenience, and that it should not prevent a sovereign State from taxing property, which is, as a matter of fact, employed within the State. *People v. Barker* (N. Y. 1897) 23 App. Div. 524; *Adams Express Co. v. Ohio* (1897) 166 U. S. 185. The true question in these cases, therefore, concerns the place where the debts are to be employed as capital, not the place of domicile of the creditor. Thus it has often been held that a non-resident corporation is taxable upon bills due in a State for business transacted there, if the bills are not merely in the State *in transitu*, but are employed there in the regular course of business. *People v. Wells* (1906) 184 N. Y. 275; *Catlin v. Hull* (1849) 21 Vt. 152. And since the entire business of the plaintiff in the principal case was carried on in New York, its accounts should clearly be taxable there, regardless of the fact that they were due from non-residents.

**TENDER—DEPOSIT IN COURT—ESTOPPEL.**—The plaintiff brought dispossess proceedings against a tenant, who deposited \$850 with the clerk of the court as a tender. The landlord was awarded possession of the premises upon proof that a greater sum was due, and now sues the clerk for the deposit. *Held*, two judges dissenting, the plaintiff could recover. *Browning, King & Co. v. Chamberlain* (1912) 134 N. Y. Supp. 1104.

It is well settled that, in a suit for a debt, a payment into court, even though not accepted, operates as an absolute transfer of the money to the creditor, *Mann v. Sprout* (1906) 185 N. Y. 109; *Munk v. Kanzler* (1900) 26 Ind. App. 105, but a deposit with a mere stakeholder does not prevent a withdrawal if there has been no acceptance. See *Mann v. Sprout supra*; *Griffiths v. Williams* (1787) 1 D. & E. 710. Since there is no legal authority for a payment into court in proceedings for the recovery of realty, *People v. Chamberlain* (N. Y. 1910) 140 App. Div. 503, the clerk in the principal case should be regarded as an unofficial stakeholder, and the plaintiff might, therefore, have disregarded the deposit. See *Levan v. Sternfeld* (1892) 55 N. J. L. 41; *Hammer v. Kaufman* (1866) 39 Ill. 87. The majority of the judges, however, held, that as both parties had assumed that the deposit was valid and the tenant had received all the benefits of an authorized payment in compelling the plaintiff to prove that he was entitled to more than \$850 in order to get possession of the premises, the tenant was estopped from setting up the irregularity of the deposit. It seems, however, that an estoppel should not arise from a misrepresentation as to the legal effect of an act, *Brewster v. Striker* (1849) 2 N. Y. 19, for this is presumed to be equally within the knowledge of both parties. *Lewis v. Jones* (1825) 4 B. & C. 506; *Fish v. Clellan* (1864) 33 Ill. 243; *Upton v. Tribblecock* (1875) 91 U. S. 45. Hence it appears that the plaintiff never acquired any right to the deposit, and should not have been permitted to recover.

**TORTS—LUNATICS—LIABILITY OF CARRIER FOR ACTS OF INSANE EMPLOYEE.**—The plaintiff, a passenger on the defendant railroad, was

assaulted by the conductor, who was insane at the time. *Held*, both the conductor and the railroad were liable. *Chesapeake & O. Ry. Co. v. Francisco* (Ky. 1912) 148 S. W. 46.

There is little dispute in the decisions that an insane person is answerable to one upon whom he inflicts a tort of which malice is not an essential element. *Krom v. Schoonmaker* (N. Y. 1848) 3 Barb. 647; *Ins. Co. v. Showalter* (1897) 3 Pa. Sup. Ct. 452; *Donaghy v. Brennan* (1900) 19 N. Z. L. R. 289. These cases proceed on the common law theory that the law looks only to the actual damage suffered, and not to the intent accompanying the act, which a lunatic is incapable of entertaining. 2 Roll. Abr. 547; see *Weaver v. Ward* (1617) Hobart 134. Accordingly compensatory damages alone are recoverable, as punitive damages are based on the presence of malice, which is absent in these cases. *McIntyre v. Sholty* (1887) 121 Ill. 660; *Krom v. Schoonmaker supra*. Public policy, which requires that those in charge of lunatics should feel constrained to keep them closely confined, is also a determining factor in allowing damages for the injury. *McIntyre v. Sholty supra*; *Ins. Co. v. Showalter supra*. Text writers, however, are almost unanimous in their disapproval of a lunatic's civil liability, Burdick, Law of Torts, (2nd ed.) 60; Pollock, Torts, (8th ed.) 55; Bishop, Non-Contract Law, § 505 *et seq.*, regarding the injury as an unavoidable accident, which, by the modern trend of authority, is *damnum absque injuria*. *Vincent v. Stinehour* (1835) 7 Vt. 62; *Morris v. Platt* (1864) 32 Conn. 75. But no decision has gone to this extent, and the principal case is in line with authority in holding the conductor liable, thus rendering the railroad company also answerable on the principle of *respondeat superior*. It would seem that recovery might also be had for the carrier's breach of its duty to safeguard the passenger from injury at the hands of its employees. See *Divinelle v. R. R.* (1890) 120 N. Y. 117; *Bryant v. Rich* (1870) 106 Mass. 180.

**TORTS—MALICIOUS USE OF PROPERTY—SPITE FENCE.**—The defendant erected a fence upon a vacant lot belonging to him, thereby shutting off light and air from the adjoining premises of the plaintiff. The plaintiff asked for an injunction to compel removal of the structure, alleging that it was of no value to the defendant, but was erected solely from malicious motives. *Held*, the injunction should be granted. *Randolph v. Norton* (Ala. 1912) 58 So. 283. See Notes, p. 633.

**TRUSTS—EXTRA DIVIDENDS—INCOME OR PRINCIPAL.**—An extra cash dividend from surplus earnings was declared upon stock held by a trustee. 89% of the dividend was accumulated after the creation of the trust. *Held*, 89% was income, belonging to the life tenant, and 11% was capital. *Matter of Harteau* (1912) 204 N. Y. 292.

The decisions of the courts in dividing extraordinary dividends between those entitled for life and those entitled in remainder are irreconcilable. 4 COLUMBIA LAW REVIEW 130; 7 COLUMBIA LAW REVIEW 344. In New York, one line of cases abides by the decision of the corporation, giving to the life tenant whatever the company pays as earnings, and to the remainderman whatever the company has appropriated as capital. *Matter of Kernochan* (1887) 104 N. Y. 618; *Matter of Rogers* (1899) 161 N. Y. 108. This is in harmony with authority in England, *Bouch v. Spoule* (1887) L. R. 12 A. C. 385, and in some jurisdictions in the United States. *Minot v. Paine* (1868) 99

Mass. 101; *Gibbons v. Mahon* (1890) 136 U. S. 549. Other cases, resting partially perhaps on the terms of the trust, look entirely to the source of the dividend, regardless of whether it was earned before or after the creation of the fund. *McLouth v. Hunt* (1897) 154 N. Y. 179; *Lowry v. Trust Co.* (1902) 172 N. Y. 137; *Robertson v. DeBrulatour* (1907) 188 N. Y. 301. So stock dividends whose ultimate source was a fund derived from earnings must go *in toto* to the life tenant. Logically dividends from unearned increment, or actual capital, as distinguished from capitalized earnings, would be the only classes of payments which would not be income under this rule. The best solution is the Pennsylvania rule, introduced by the principal case, which divides dividends according to the period when earned. *Barp's Appeal* (1857) 28 Pa. St. 368. It rests on the implied intention of the settlor that earnings accumulated and directly affecting the value of the securities before the creation of the trust should be considered capital, and those accumulated later should be distributed as income. *Clarkson v. Clarkson* (1885) 18 Barb. 646; cf. *Matter of Stevens* (1907) 187 N. Y. 471.

VENDOR AND PURCHASER—WARRANTY OF TITLE—LIEN OF WAREHOUSEMAN.—The plaintiff purchased goods from the defendant, receiving an order for them drawn upon the warehouseman with whom they were stored. On his attempt to take possession three months later, without previous notice, the warehouseman asserted a general lien for a debt due from the original owner, which had arisen subsequent to the sale. The vendee thereupon sued the vendor. *Held*, he had no cause of action. *Cohen v. Judd* (1912) 135 N. Y. Supp. 587.

At common law, payment of the purchase price and delivery of an order on the warehouseman were considered sufficient evidence of intention to pass title to the goods as between vendor and vendee. *Russell v. Carrington* (1870) 42 N. Y. 118; *Ghirardelli v. McDermott* (1863) 22 Cal. 539. The same result is reached under the New York Sales Act, such an order being probably a document of title, and no notice to the warehouseman is necessary. N. Y. Pers. Prop. Law, §§115, 156. Even if possession by a bailee be considered constructive notice to the vendee of liens existing at the time of sale, see *Pope v. Steward* (1901) 69 Ark. 306; 2 Pomeroy's Eq. Jur. (3rd ed.) § 615, it cannot render effective a lien which arises later. It is provided by statute in New York, however, that goods stored in a warehouse are subject to attachment by the vendor's creditors before notice of the change of title has been given to the warehouseman, N. Y. Pers. Prop. Law, §115, and it would seem within the spirit of the statute to enforce a lien for debts due from the vendor acquired subsequent to the sale but prior to notification. Since the plaintiff's own neglect to give notice has permitted the lien to arise, he cannot complain of the failure of consideration, nor can recovery be had on an implied warranty of title, which covers only encumbrances existing at the time of sale. N. Y. Pers. Prop. Law, §94.